No. 01 755

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

DENNIS McLIN,

Petitioner,

—v.—

BOARD OF POLICE COMMISSIONERS OF THE METROPOLITAN ST. LOUIS POLICE DEPARTMENT, WAYMAN F. SMITH, III, JEFF S. JAMIESON, EDWARD M. ROTH, LESLIE F. BOND, CLARENCE HARMON, PAUL NOCCHIERO, CHARLES MISCHEAUX, ANNE-MARIE CLARK, MATTHEW PADBERG, ROBERT HARR, AND RONALD HENDERSON,

Respondents.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

Steven R. Shapiro
Reginald T. Shuford
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Frank Susman
(*Counsel of Record*)
Scott D. Levine
Denise D. Lieberman
American Civil Liberties Union,
Eastern Missouri Fund
4557 Laclede Avenue
St. Louis, Missouri 63108
(314) 361-2111

QUESTION PRESENTED

Did the court of appeals err in holding that a police department may discipline one of its officers for exercising his First Amendment right to speak publicly about issues of police brutality and racism, while off-duty and acting as a private citizen, in the absence of any evidence that the officer's comments interfered with police discipline or disrupted working relationships?

PARTIES TO THE PROCEEDING

Petitioner is Saint Louis Police Officer Dennis McLin. Respondents are the Board of Police Commissioners, St. Louis Metropolitan Police Department, of the City of St. Louis, Mo; Wayman F. Smith, III; Jeff S. Jamieson; Edward Roth; Leslie Bond, Sr.; Clarence Harmon; Paul M. Nocchiero, individually and in their capacities as members of the Board of Police Commissioners, City of St. Louis, Mo; Charles Mischeaux; Anne-Marie Clark; Matthew Padberg; Robert Harr, individually and in their capacities as former members of the Board of Police Commissioners, the City of St. Louis, Mo; Ronald Henderson, individually and in his capacity as Chief of St. Louis Metropolitan Police Department.

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DENNIS McLIN,

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BOARD OF POLICE COMMISSIONERS OF THE METROPOLITIAN ST. LOUIS POLICE DEPARTMENT, WAYMAN F. SMITH, III, JEFF S. JAMIESON, EDWARD M. ROTH, LESLIE F. BOND, CLARENCE HARMON, PAUL NOCCHIERO, CHARLES MISCHEAUX, ANNE-MARIE CLARK, MATTHEW PADBERG, ROBERT HARR, AND RONALD HENDERSON,

Respondents.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

Dennis McLin respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals for the Eighth Circuit (Appendix ("App.") A-3 to A-7), No. 00-2799, 2001 WL 574585, 2001; U.S. App. LEXIS 11015 (8th Cir. May 29, 2001) is unpublished. The opinion of the district court, Eastern District of Missouri, Eastern Division (App. A-8 to A-22), No. 4:99CV514-DJS, April 21, 2000, is unpublished.

JURISDICTION

The court of appeals entered its judgment on May 29, 2001. The court of appeals denied a timely petition for the rehearing on August 17, 2001. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner, Dennis McLin, is and has been employed as a police officer for the Metropolitan St. Louis Police Department ("MSLPD") for almost fourteen years. While employed with the MSLPD, McLin received regular promotions and salary increases and, until the event in question, was considered an outstanding police officer. Since 1994, McLin has served as the Midwest Regional President of the National Black Police Association ("NBPA"). App. A-10. The NBPA was formed in St. Louis in 1972 for the purpose of advancing the interests of the members of the nation's police departments who are black, as well as advancing the interests of the African-American community as a whole. The NBPA is a private organization independent of the MSLPD. The NBPA is an open membership organization and has approximately 35,000 dues-paying members nation-wide.

In September 1997, McLin attended a community educational workshop on police brutality and racism sponsored in part by the NBPA. Id. The workshop, which was free and open to the public, was held at AfroCentric Books, a St. Louis bookstore, Id. and approximately 40 people attended. McLin was off-duty and in civilian attire while at the workshop. He attended as a private citizen and as a representative of the NBPA, not in any official capacity as a representative of the MSLPD. While at the workshop, McLin conveyed his personal viewpoints on the topics of police abuse and racism.

The *St. Louis American*, a weekly newspaper serving the African-American community in St. Louis, covered the event. Id. An article on the workshop appeared in its October 2-8, 1997, edition. App. A-25 to A-27. The article, entitled

"Policeman Takes Stand Against Abuse," begins: "Verbal and physical abuse by police are sicknesses that can be cured, said a St. Louis police officer known for his efforts to improve treatment of black officers and civilians." App. A-25. It continues: "Dennis McLin recently addressed a workshop on police brutality—how to avoid it and what to do about it." Id.

The article then describes the workshop in greater detail, paraphrasing and quoting McLin on the subject of abuse and racism among police officers. Id. According to the article, McLin offered "suggestions on what to do when being detained." Id. "[McLin] suggested that persons should remain calm and logical, even if the officer is acting improperly." Id. The article also describes advice given by McLin regarding an individual's rights when stopped by the police. Id.

At the workshop, McLin also spoke about the widespread problem of racism in police departments and how to address it. The article states: "Young black males are frequent targets of police stops and questioning, and many police departments have secret codes to identify black motorists who enter their turf, McLin said." App. A-26. It continues: "In St. Louis, many 'Billy Bob, tobacco chewing white police officers are recruited from 'Boondocks, Missouri' and lack diversity and racial sensitivity,' McLin said. 'Often abusive officers were sissies in high and grade school. But when they put on that uniform they are the man they never were before.'" App. A-10-11, A-26.

According to the article, "Racism and abuse among police is rampant, McLin said. 'I don't forget where I'm coming from. Everyday I put on that uniform I am a black man and they do not let me forget that. To (some white) we

are just Negroes with badges on.'" App. A-27. According to the article, "McLin urged the public to speak out against police brutality and to file complaints. Document the circumstances of police brutality; support each other in challenging such incidents; and provide investigators with solid statements and accurate information . . ." App. A-27.

Based on two of these statements, the MSLPD charged McLin with a violation of Rule 7, Section 7004(jj) of the police manual. App. A-11. That section provides that a police officer shall be subject to disciplinary action for "[e]ngaging in any conduct or acts on or off duty which could bring discredit upon the Department or its personnel." App. A-11. The MLSPD conducted no investigation of how or whether McLin's conduct affected its ability to maintain discipline, morale or the proper chain of command. Not surprisingly, therefore, MLSPD had no evidence before it that McLin's comments in any way affected the its ability to maintain discipline, morale, and the proper chain of command. Nevertheless, after a hearing on the charges before the MSLPD Summary Hearing Board, McLin was suspended for fifteen days without pay for defaming white police officers, App. A-11, and a permanent record of the disciplinary action was placed in his personnel file. The Board of Police Commissioners of the MSLPD affirmed this decision of the Summary Hearing Board and extended his suspension.

In 1999, McLin brought an action against MSLPD in the U.S District Court, Eastern District of Missouri, for violating his right of freedom of speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. § 1983. App. A-9. On April 21, 2000, the District Court held that his speech was unprotected because it did not involve a matter of public concern. App. A-14. Additionally, the court went on to say

that even assuming the speech involved a matter of public concern, the disciplinary sanction imposed by MSLPD was a proper exercise of its authority under the balancing test announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968). App. A-19. The district court granted MSLPD's motion for summary judgment and entered a final judgment dismissing McLin's compliant. App. A-20. On June 19, 2001, the Court of Appeals for the Eighth Circuit affirmed the lower court's application of the *Pickering* test. App. A-5. McLin then filed a Petition for Rehearing En Banc with the Eighth Circuit, which was denied on August 17, 2001. App. A-2.

REASONS FOR GRANTING THE WRIT

I. The First Amendment Right of Police Officers To Speak Out Publicly and Off-Duty About Questions of Race and Policing is an Issue of National Significance.

This case raises an issue of major national importance: the ability of black police officers to speak publicly and off-duty about racial issues affecting their departments without fear of adverse employment consequences. In this case, the district court expressed doubt as to the public significance of McLin's speech about racism and police brutality in the Metropolitain St. Lôuis Police Department ("MSLPD"), holding that it was not a matter of public concern, and that even if it were, the public interest in his speech was outweighed by the MSLPD's interest in maintaining a harmonious and efficient operation. In affirming the district court, the court of appeals assumed Petitioner's comments involved a matter of public concern, but never identified or assigned any weight to it. To the extent both courts recognized the speech as involving a matter of public concern, they significantly undervalued the degree to which racism within the MSLPD would be a matter of public concern and the showing required under the First Amendment in order to penalize someone for that speech. Had the district court given appropriate weight to this concern, its application of the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), would have yielded a different outcome.

A. Speech on Police Racism and Brutality is a Matter of Public Concern.

This Court has defined speech on a matter of public concern as "relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. In assessing the First Amendment rights of public employees, however, finding speech to be on a matter of public concern does not end the inquiry. Regulating speech considered contrary to a public employer's interests requires a "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

By any measure, Petitioner's speech at the community workshop on police racism and brutality is a matter of public concern. *See Connick*, 461 at 148 n.8 ("[R]acial discrimination [is] a matter inherently of public concern."). *See also Sexton v. Martin*, 210 F.3d 905, 910 (8th Cir. 2000) ("[S]peech concerning potential misconduct by public officers is a matter of public concern."); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir.1984) (The "public has a vital interest in the integrity of those commissioned to enforce the law.")

In the past several years, the issue of racial profiling - and the attendant issue of racism within police departments - has become one of the preeminent civil rights issues of the day. "Driving while black or brown" is now a household

term. Courts and legislatures, communities and law enforcement agencies around the country grapple with this issue on a regular basis. President Bush, Attorney General John Ashcroft, and former President Clinton have spoken out against racial profiling. Many public officials, including former New Jersey Governor Christie Whitman, have admitted that it exists. Likewise, the American public has weighed in on the issue, expressing overwhelming disapproval of it. A Gallup poll found that a majority of Americans, 59 percent, found racial profiling to be widespread, and 81 percent found it to be wrong. Frank Newport, *Racial Profiling Is Seen As Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE, December 9, 1999. Moreover, roughly three-fourths of young black men report that they have been the victims of racial profiling. *Id.*

In the recent past, this Court itself has acknowledged the phenomenon of race-based policing. In *Atwater v. City of Lago Vista*, 121 S.Ct. 1536 (2001), Justice O'Connor recognized the potential for race to become intertwined in police-citizen encounters when police officers are given too much discretion: "Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual." *Atwater*, 121 S.Ct. at 1567 (O'Connor, J., dissenting, joined by Stevens, Ginsberg, and Breyer, J.J.). In *Illinois v. Wardlow*, 528 U.S. 119 (2000), Justice Stevens, dissenting from the holding that the Fourth Amendment does not prohibit police officers from relying on a person's flight as the basis for a *Terry* stop, noted that residents of minority communities may have legitimate reasons for fleeing out of fear of race-based, law enforcement actions and discussed reports of racial profiling by law enforcement agencies around the country. *Wardlow*, 528 U.S. at 132-34 & nn. 7-9 (Stevens, J., dissenting, joined by

Souter, Ginsberg, and Breyer, J.J.). And, in *Whren v. United States*, 517 U.S. 806 (1996), the Court recognized the reality of raced-based policing, stating that "police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants," and opining that the proper basis for challenging race- based policing is the Equal Protection Clause rather than the Fourth Amendment. *Whren*, 517 at 810 & 813.[1]

In holding that Petitioner's speech acknowledging the racially insensitive and abusive nature of some of his fellow officers was not on a matter of public concern, the district court took insufficient note of this history. It also undervalued the tremendous impact of race-based policing on communities and officers of color, and this affected its application of the balancing test under *Pickering*. The topic of this community workshop itself - police brutality and racism - bears out the perception in many communities of color of the existence of racially motivated police officers and the need for accurate information on how to address their concerns. Petitioner was in the best possible position to provide that information. In affirming the district court's application of the *Pickering* test by accepting *arguendo* that Petitioner's speech constituted a matter of public concern but failing to identify or discuss it to any significant degree, the

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[1]Even before racial profiling became a familiar concept in the public discourse, race-based policing, including police brutality, had long been a source of controversy and debate, including in McLin's community. The workshop at which McLin spoke was preceded by several widely reported incidents of police brutality against minority youth in St. Louis and protests against those incidents by members of the community.

court of appeals likewise unconstitutionally gave the issue short shrift.[2]

B. A Public Employer May Not Punish an Employee for Speaking on a Matter of Public Concern Unless it Can Make a Substantial Showing of Actual or Potential Disruption.

Under *Connick* and *Pickering*, speech on a matter of public concern receives First Amendment protection unless its potential for disruptiveness outweighs its value. The

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[2] McLin was disciplined for, and the lower courts considered, two isolated phrases of his speech, apart from their form and context. Yet, "[w]hether an employee's speech addresses a matter of public concern *must* be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-148 (emphasis added). *See also Lewis v. Cowen*, 165 F.3d 154, 163-164 (2nd Cir. 1999) (While "taking into account the content, form, and context of a given statement as revealed by the whole record . . . the court should focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose."); *Czurlanis v. Albanese*, 721 F.2d 98, 104 (3rd Cir. 1983); *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 192 (4th Cir. 1994); *Cooper v. Smith*, 89 F.3d 761, 765 (11th Cir. 1996). Even if caustic or offensive, the isolated phrases for which McLin was disciplined, cannot undermine the first amendment value of McLin's speech. *Rankin v. McPherson,* 483 U.S. 378, 387 (1987) ("Debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (citations omitted); *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993) ("The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern.").

extent of the government's burden "varies depending on the nature of the employee's expression." *Connick*, 461 U.S. at 150. The more important the speech, the heavier the government's burden to produce evidence of actual or threatened disruption. *See Connick*, 461 U.S. at 152; *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) ("In many . . . situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished.").[3] The failure of the lower courts to properly assess the public importance of Petitioner's speech thus led to a fundamental distortion of the *Pickering* balance.

In *Connick*, an assistant district attorney was fired for, among other things, circulating a questionnaire about office morale and supervision. The Court found that only one of the questions in the questionnaire, inquiring about pressure placed on employees to participate in political campaigns, raised a matter of public concern. 461 U.S. at 149. Concluding, therefore, that the First Amendment interest in *Connick* was only a limited one, the Court held that the employer's burden to show disruption was also limited. *Id.* at 154. The Court "caution[ed], however, that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." *Id.* at 152; *accord Sexton v. Martin*, 210 F.3d at 911-12 ("The more the employee's speech reflects matters of public concern, the

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[3] In fact, the Eighth Circuit, in a case with strikingly similar facts, required a public employer to make a showing of *actual* disruption. *Washington v. Normandy Fire Protection District*, No. 00-3828, 2001 U.S. App. LEXIS 23832 (8th Cir. 2001) ("The *Pickering* balancing test is applicable, however, only if it is first established that the speech in question created a disruption in the workplace.") (citations omitted); *accord, Sexton v. Martin*, 210 F.3d 905, 909 (8th Cir. 2000).

greater the employer's showing must be that the speech was disruptive before the speech can be punished.") (Internal citations omitted.); *and Jeffries v. Harleston*, 52 F.3d 9,13 (2d Cir.), *cert. denied*, 516 U.S. 862 (1995).

Pickering is instructive on the stronger showing that is necessary to deprive a public employee of his right to speak where, as in this case, a substantial First Amendment interest is at stake. *Pickering* involved a school teacher who was fired for writing and sending a letter to the local newspaper which was highly critical of the manner in which the board of education had handled past proposals to raise revenue. In *Pickering*, the Court observed:

> What we have . . . [are] public statements upon then issues of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

Pickering, 391 U.S. at 572-73 (footnote omitted).

As in *Pickering*, the record in this case contains no credible evidence of disruption.[4] There is no evidence that Petitioner's statements in any way impeded his ability to perform his daily duties or interfered with the regular operations of the MSLPD. Instead, both lower courts appeared to presume that because of a general need for the police department to maintain discipline, esprit de corps, and uniformity, *any* disquiet whatsoever was, in effect, sufficient to override Petitioner's First Amendment rights. This conclusion is contrary to longstanding principles of constitutional jurisprudence requiring justification for regulating First Amendment speech rights. *See generally Connick*, 461 U.S. at 152; *Churchill*, 511 U.S. at 674. To justify this departure from established First Amendment norms, the courts below relied exclusively and erroneously

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[4]The only ostensible "evidence" of disruption in this case was two letters of complaint submitted by police unions condemning Petitioner's comments and calling for an investigation. The district court found the letters "to at least raise the perception that plaintiff's speech was causing disruption in the workplace." App. A-1. Fairly read, however, those letters amounted to nothing more than a heckler's veto that does not respect the *Pickering* balancing test as much as obliterate it. *Cf. Connick v. Myers*, 461 U.S. 138, 169 (1983) (Brennan, J., dissenting) (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508, 509) ("'[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' . . . In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."); *Sexton v. Martin*, 210 F.3d at 912-13 (Public employer's "vague and conclusory statements do not demonstrate with any specificity that the speech created disharmony in the workplace, impeded the plaintiffs' ability to perform their duties, or impaired working relationships with other employees.")

on *Kelley v. Johnson*, 425 U.S. 238 (1976), a case that did not even involve speech.

In *Kelley*, a police officer challenged the county's hair grooming regulation, arguing that it deprived him of his Fourteenth Amendment liberty interest in choosing his own hairstyle. Employing a rational basis analysis (rather than the balancing test announced in *Pickering* for First Amendment public employment cases), the Court held that the regulation was neither irrational nor arbitrary, whether the county's interest in similarity of appearance was based on a desire to make police officers easily recognizable to the public or to foster esprit de corps. *Kelley*, 425 U.S. at 248. The Court reasoned that "[c]hoice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." *Kelley*, 425 U.S. at 247. The Court concluded that, given the "overall need for discipline, esprit de corps, and uniformity," the county's hair grooming regulation was entitled to deference. *Id.* at 246.

Under our constitutional system, it is one thing to say that a police department's interest in discipline and esprit de corps is sufficient to uphold a regulation requiring officers to dress and groom in a uniform fashion. It is a very different proposition for the police department to insist that its officers think and speak uniformly -- especially when officers are speaking in their private capacity, off-duty, and about matters of obvious public concern with which they are intimately familiar. *Kelley* itself recognizes an important distinction between challenges based on "the explicit language of the First Amendment" and those based on "the more general contours of the substantive liberty interest protected by the Fourteenth Amendment." 425 U.S. at 245. Nevertheless, the lower courts have far too frequently assumed that *Kelley*

provides a police department with virtually *carte blanche* authority to dictate the off-duty speech of its police officers as easily as it dictates their on-duty appearance. This case is one example of that misguided approach, but it is hardly the only one.[5]

Moreover, as the facts of this case vividly demonstrate, the consequence of the rule adopted by the courts below is to deprive the public of the views and experiences of those public employees who are often the most knowledgeable about matters and issues of concern to

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[5]*E.g.*, *Maciarello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (police are paramilitary organization, with fewer speech rights than other employees because of historical interest in discipline, uniformity, esprit de corps); *Brown v. City of Trenton*, 867 F.2d 318, 322 (6th Cir. 1989) (deference given to city's judgment on discouraging public dissension within its safety forces); *Breuer v. Hart*, 909 F.2d 1035, 1041 (7th Cir. 1990) (speech interfering with law enforcement agency's order, discipline, and esprit de corps could be debilitating); *Hughes v. Whitmer*, 714 F.2d 1407, 1418 (8th Cir. 1983) (highway patrol given latitude in regulating employees' speech rights because of interest in promoting efficiency, loyalty, obedience, morale, and public confidence); *Kannisto v. City and County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976) (deference to be given police department's policy regulating speech because of interest in discipline, esprit de corps, and uniformity); *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995) (police officer's interest in speaking about race relations in the department, while on duty and in uniform, outweighed by department's interest in controlling who speaks on city's behalf); *Hansen v. Soldenwagner*, 19 F.3d 573, 577 (11th Cir. 1994) (order and morale critical to successful police work); *O'Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998) (noting that a number of courts had extended "esprit de corps" presumption to regulation of speech).

the public. *See Churchill*, 511 U.S. at 674 ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."); *accord Pickering*, 391 U.S. at 572. Petitioner does not believe that such a rule - one which, in the current context, would silence minority police officers from speaking publicly on a controversial topic both personally familiar to them and of tremendous import to the public at large - accurately reflects what the law is or should be. This case warrants plenary review by the Court to decide whether *Kelley* should be extended to speech cases, particularly given the intense public debate now underway about race and policing.

CONCLUSION

Because this case involves an issue of national significance regarding the first amendment right of police officers to speak out publicly and off-duty about questions of race and policing, the Court should grant the petition for writ of *certiorari*.

Respectfully Submitted,

Steven R. Shapiro
Reginald T. Shuford
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

Frank Susman
(Counsel of Record)
Scott D. Levine
Denise D. Lieberman
American Civil Liberties
Union, Eastern Missouri Fund
4557 Laclede Ave.
St. Louis, MO 63108
(314) 361-2111

Dated: November 13, 2001

APPENDIX

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Dennis McLin v. Board of Police Commissioners of the Metropolitan Police Department of the Metropolitan Police Department of the City of St. Louis, Wayman F. Smith III, Jeff S. Jamieson, Edward M. Roth, Leslie F. Bond, Sr., Clarence Harmon, Paul Nocchiero, Charles Micheaux, Anne-Marie Clark, Ronald Padberg, Matthew Harr and Ronald Henderson, No. 4:99CV514-DJS, Memorandum and Order of the United States District Court, Eastern District of Missouri A-9

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2799

Dennis McLin,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**Order Denying**
Board of Police Commissioners,	)	**Petition for**
St. Louis Metropolitan Police	)	**Rehearing and**
Department, of the City of St.	)	**for Rehearing**
Louis, MO, et al.,	)	***En Banc***
	)	
Appellees.	)	

The petititon for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge McMillian would grant the petition.

(5128-010199)

August 17, 2001

Ordered at the Direction of the Court:

Michael E. Gans
Clerk, U.S. Court of Appeals, 8th Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2799

Dennis McLin,	)
Appellant,	)
v.	)
Board of Police Commissioners,	) **Appeal from the**
St. Louis Metropolitan Police	) **United States**
Department, of the City of St.	) **District Court**
Louis, MO; Wayman F. Smith, III;	) **for the**
Jeff S. Jamieson; Edward Roth;	) **Eastern District**
Leslie Bond, Sr.; Clarence	) **of Missouri**
Harmon; Paul M. Nocchiero,	)
individually and in their capacities	) **UNPUBLISHED**
as members of the Board of Police	)
Commissioners, City of St. Louis,	)
MO; Charles Mischeaux; Anne-	)
Marie Clark; Matthew Padberg;	)
Robert Harr, individually and in	)
their capacities as former members	)
of the Board of Police	)
Commissioners, the City of St.	)
Louis, MO; Ronald Henderson,	)
individually and in his capacity as	)
Chief of St. Louis Metropolitan	)
Police Department,	)
Appellees.	)

April 10, 2001, Submitted
May 29, 2001, Filed

Before BOWMAN and FAGG, Circuit Judges, and PIERSOL,[1] District Judge. PIERSOL, District Judge, concurring.

PER CURIAM.

Dennis McLin, a St. Louis police officer, brought this 42 U.S.C. § 1983 action against the Board of Police Commissioners, claiming the Board violated his free-speech rights under the First Amendment by suspending him for fifteen days without pay. The discipline was imposed as a result of some of McLin's comments during a workshop on police brutality and racism. His comments, made publicly and reported in the press, included a statement that in St. Louis, many "Billy Bob, tobacco chewing white police officers" are recruited from "Boondocks, Missouri" and lack diversity and racial sensitivity. They also included a statement that "Often abusive officers were sissies in high school and grade school. But when they put on that uniform they are the man they never were before."

The District Court[2] granted summary judgment in favor of the Board. The court applied the familiar framework established by Connick v. Myers, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). First, the court determined that McLin's above-

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[1] The Honorable Lawrence L. Piersol, Chief Judge, United States District Court for the District of South Dakota, sitting by designation.

[2] The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

quoted comments went beyond any matter of public concern, because they amounted to personal attacks on fellow officers. Thus, in the court's view they were not protected speech. In the alternative, the court assumed that the comments in question were protected speech and applied the Pickering balancing test, concluding that McLin's interest in making these comments did not outweigh the Board's interest in promoting the harmonious and efficient operation of the police department by disciplining McLin for making the comments. McLin appeals.

For reversal, McLin attacks both aspects of the District Court's ruling. Assuming for purposes of analysis that McLin's comments were protected speech, we reject his argument that the court erred in its application of the Pickering balancing test. Having carefully reviewed this issue, we believe the District Court correctly held, after thorough examination of the various Pickering factors, that the Pickering test tips in favor of the Board. We are satisfied that no genuine issues of material fact exist to preclude summary judgment on this ground and that the Board is entitled to judgment as a matter of law. Accordingly, we affirm. See 8th Cir. R. 47B.

PIERSOL, District Judge, concurring.

I concur with the majority that the Pickering test tips in favor of the Board, but I write separately to address the District Court's error in holding that McLin's comments were not protected speech on a matter of public concern.

If an employee's speech cannot be characterized as constituting speech on a matter of public concern, that is, a matter of political, social, or other concern to the community, federal courts need not even consider the reasons for

discipline or discharge of the employee. Connick v. Myers, 461 U.S. 138, 146-147, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Id., 461 U.S. at 147-148, 103 S. Ct. at 1690. A review of the whole record in this case reveals that McLin's comments addressing police brutality and racial discrimination were in content, form and context a matter of public concern.

Assuming it is not related entirely to a private dispute between the plaintiff and defendant, racism in a public agency is inherently a matter of public concern. See Connick, 461 U.S. at 148 n.8, 103 S. Ct. at 1691 n.8 (noting that racial discrimination is a matter inherently of public concern). The content of McLin's speech was of public concern because it was a protest against police abuse and racism.

The context of McLin's comments also reinforces the conclusion that his speech addressed a matter of public interest and concern. McLin's remarks were made in the context of a workshop on police brutality and racism sponsored by the National Black Police Association, of which McLin was the Midwest Regional President. The workshop, held at the AfroCentric Bookstore in St. Louis, was free and open to the public. Approximately 40 people attended, including a representative of the press. McLin was a speaker at the workshop and some of his comments were reported by the St. Louis American newspaper.

The form of a few of McLin's remarks may have been offensive to some individuals, but this Court has emphasized that the offensiveness of a statement is irrelevant to the issue whether a matter is of public concern. See Casey v. City of

Cabool, 12 F.3d 799, 803 (8th Cir. 1993); see also Rankin v. McPherson, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987) ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.").

In Rankin, supra, an employee of the police department remarked, after hearing that President Reagan was shot, "If they go for him again, I hope they get him." 483 U.S. at 380, 107 S. Ct. at 2894. The Supreme Court held that this disconcerting statement addressed a matter of public concern. Id., 483 U.S. at 388, 107 S. Ct. at 2899. The Court stated, "'Debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Id., 483 U.S. at 387, 107 S. Ct. at 2898 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964)). In Casey v. City of Cabool, supra, this Court compared the plaintiff's statements criticizing fire department policies, his remarks accusing the city clerk of using city resources to repair her home, and his allegation that the mayor knew about the city clerk's activities but did nothing, with the statement made about the president by the plaintiff in Rankin, and said, "Nothing that Casey is alleged to have said could be more disturbing than an expressed desire by a law enforcement employee to see criminal violence inflicted on the president." 12 F.3d at 803. The Court held that Casey's speech addressed matters of public concern. Id.

Although some of McLin's remarks may have been offensive to some people, they were not as offensive as the statement that the Supreme Court found was protected speech in Rankin. In addition, McLin's statements addressed a serious social problem-the link between racism and police brutality. For these reasons, I see no need to assume that

McLin's comments addressed a matter of public concern. Since the record clearly supports this conclusion, I would expressly hold that McLin's comments were protected speech.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DENNIS MCLIN,	)	
	)	
Plaintiff,	)	No. 4:99CV514-DJS
	)	
vs.	)	
	)	FILED
BOARD OF POLICE	)	APR 21 2000
COMMISSIONERS OF THE	)	U.S. Dist. Court
METROPOLITAN POLICE	)	Eastern District
DEPARTMENT OF THE CITY OF	)	of MO, St.Louis
ST. LOUIS, WAYMAN F.	)	
SMITH, III, JEFF S. JAMIESON,	)	
EDWARD M. ROTH, LESLIE F.	)	
BOND, SR., CLARENCE	)	
HARMON, PAUL NOCCHIERO,	)	
CHARLES MISCHEAUX, ANNIE	)	
MARIE CLARK, RONALD	)	
PADBERG, MATTHEW HARR,	)	
and RONALD HENDERSON,	)	
	)	
Defendants.	)	

ORDER

On March 30, 1999, plaintiff Dennis McLin, a member of the Metropolitan St. Louis Police Department ("MSLPD"), filed the instant action claiming that defendants violated his First Amendment free speech rights and are

therefore liable under 42 U.S.C. §1983. Defendants in this action are the Board of Police Commissioners of the Metropolitan Police Department of the City of St. Louis ("the Board") and Chief of Police Ronald Henderson, as well as current and former members of the Board.[1] This matter is before the Court on defendants' motion for summary judgment, which is based on the following uncontroverted facts.

In September of 1997, plaintiff attended a workshop on police brutality and racism sponsored by the National Black Police Association ("NBPA"), of which plaintiff is the Midwest Regional President. The workshop, which was held at the AfroCentric Bookstore, was free and open to the public. Plaintiff spoke at the workshop, and his comments were reported by the St. Louis American newspaper. A passage in the newspaper article read as follows:

> In St. Louis, many "Billy Bob, tobacco chewing white police officers- are recruited from "Boondocks, Missouri" and lack diversity and racial sensitivity, McLin said.
>
> "Often abusive officers were sissies in high and grade school. But when they put on

[1] The Court believes that three of the Board members' names are spelled incorrectly in the complaint. The defendant listed as Annie Marie Clark should be Anne-Marie Clarke. The defendant referred to as Ronald Padberg should be Matthew Padberg, and the defendant listed as Matthew Harr should be Robert Haar. The Court will refer to these defendants by their correct names in the order.

> that uniform they are the man
> they never were before."

Newspaper article, Doc. #46, Exhibit A. Based on the comments quoted above, the MSLPD charged plaintiff with a violation of Rule 7, Section 7.004(jj) of the police manual. That section provides that a police officer shall be subject to disciplinary action for "[e]ngaging in any conduct or acts, on or off duty, which could bring discredit upon the Department or its personnel." Plaintiff was suspended for fifteen days without pay for the violation.[2]

Plaintiff also contests a misconduct report[3] that was placed in his permanent employee file for actions taken at an NBPA conference in Detroit, Michigan, in August of 1996. Defendants contend that during a conference luncheon, plaintiff presented the mayor and chief of police of Detroit with a box of Uncle Ben's white rice and a box of Oreos. However, plaintiff attests that neither the mayor or the chief of police of Detroit attended the luncheon. McLin Affidavit, Doc. #46, Exhibit D, ¶23.

This Court must grant summary judgment if, based upon the pleadings, admissions, depositions, and affidavits, there exists no genuine issue of material fact and the moving

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[2] In his complaint, plaintiff alleges that he is subject to continuing discipline based on this violation; however, the parties have filed a joint stipulation in which plaintiff withdraws his charges of continuing retaliation. .joint Stipulation, Doc. #40.

[3] In their motion for summary judgment, defendants reference the misconduct report and cite it as Exhibit C. However, no Exhibit C was attached to defendants' motion, and defendants' counsel declined to provide the exhibit upon the Court's request.

party is entitled to judgment as a matter of law. Fed. R. Civ. P.56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party must initially demonstrate the absence of an issue for trial. Id. at 323. Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986). Nevertheless, once a motion is properly made and supported, the nonmoving party may not rest upon the allegations in its pleadings but must instead set forth specific facts showing that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56 (e). Summary judgment must be granted to the movant if, after adequate time for discovery, the nonmoving party fails to produce any proof to establish an element essential to the party's case and upon which it bears the burden of proof at trial. Celotex Corn., 477 U.S. at 322-24. For "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Summary judgment in favor of the Board is appropriate because the Board is not a suable entity. Edwards v. Baer, 863 F.2d 606, 609 (8th Cir. 1988). Thus, jurisdiction can only be obtained by suing the Board's individual members. Lawrence v. Board of Police Comm'rs, 604 F.Supp. 1229, 1232 (E.D.Mo. 1985); see also Best v. Schoemehl, 652 S.W.2d 740, 742 (Mo.Ct.App. 1983) ("An action against the 'St. Louis Board of Police Commissioners' in that name alone does not lie.").

The remaining defendants in this action are Chief of Police Ronald Henderson, as well as current and former members of the Board. Plaintiff's complaint lists the following individuals as current members of the Board: Wayman F. Smith, III, Jeff S. Jamieson, Edward M. Roth,

Leslie F. Bond, Sr., Clarence Harmon, and Paul Nocchiero. Charles Mischeaux, Anne-Marie Clarke, Matthew Padberg, and Robert Haar are listed as former members of the Board. Henderson and the current and former members of the Board are sued in their official capacities and as individuals.

As for the remaining defendants, their first argument in support of summary judgment is that they are immune from suit in federal court because they fall within the protections of the Eleventh Amendment. The Eleventh Amendment bars suits against a state by individuals in federal court. Papasan v. Allain, 478 U.S. 265, 276 (1986). "This bar exists whether the relief sought is legal or equitable." Id. However, in order to qualify for Eleventh Amendment immunity, the organization or individual sued must be either the state itself or an instrumentality of state government. The Supreme Court has held that the Board of Police Commissioners of the Metropolitan Police Department of the City of St. Louis does not share the Eleventh Amendment immunity of the State of Missouri. See Auer v. Robbins, 519 U.S. 452, 456 n.1 (1997). Therefore, summary judgment in favor of defendants based on the argument that they have Eleventh Amendment immunity is not appropriate.

Defendants next argue that they are entitled to summary judgment because plaintiff's speech does not fall within the definition of protected speech as defined by the Supreme Court in Connick v. Meyers, 461 U.S. 138 (1983), and Pickering v. Board of Education, 391 U.S. 563 (1968). Those cases provide a two-step framework for deciding whether a disciplinary action against a public employee violates his First Amendment rights: The Court must first decide whether the speech for which the employee is punished can be characterized as constituting speech on a matter of public concern. Connick, 461 U.S. at 146. Next, the

Court considers whether the interest of the employee in commenting on the matter outweighs the public employer's interest in promoting its efficiency by prohibiting the conduct. Pickering, 391 U.S. at 568. Because plaintiff asserts that his First Amendment rights were violated by his suspension and by the placement of a misconduct report in his file, the Court must conduct two separate analyses of the facts underlying each incident. The Court begins its analysis with the events related to the September 1997 workshop.

As to the first factor of the Connick/Pickering test, defendants concede that the general topic on which plaintiff spoke -- potential racism in the police department -- was a matter of public concern. However, they contend that plaintiff's specific comments that "many `Billy Bob, tobacco chewing white police officers' are recruited from `Boondocks, Missouri' and lack diversity and racial sensitivity, and that fellow officers are sissies were vitriolic personal attacks, and therefore, not a matter of public concern. It is important to reiterate that plaintiff fails to dispute that he was only punished for these two comments and not his more general comments on alleged racism within the police department. See Summary Hearing Board Findings of Fact, Conclusions of Law, Decision and Order, Doc. #46, Exhibit B.

Several Eighth Circuit cases hold that when what started out as protected debate turns into "caustic personal attacks," the speech is no longer deemed relevant to "a matter of public concern," Dunn v. Carroll, 40 F.3d 287, 293 (8th Cir. 1994); Smith v. Cleburne County Hosp., 870 F. 2d 1375 (8th Cir. 1989). Although plaintiff is correct in asserting that his general discussion of alleged racial problems within the police department is protected speech on a matter of public concern, the Court's inquiry is not into whether all of plaintiff's statements during the workshop were on a matter

of public concern, but rather, whether the comments for which plaintiff was disciplined meet that criterion. Because the Court finds that the two comments for which he was disciplined are nothing more than personal attacks on fellow officers, they are not protected speech.

However, the Court is reluctant to grant summary judgment in defendants' favor without conducting the second prong of the analysis, known as the Pickering balancing test, because of language in another Eighth Circuit case, Casey v. City of Cabool, 12 F.3d 799 (8th Cir. 1993). In Casey, which was decided a year before the Dunn case cited above, the Eighth Circuit stated:

> The City's reliance on Cleburne County Hospital is misplaced. That case was simply an application of the Pickering balancing analysis, not an exception to it. The doctor in that case was denied staff privileges not because of personal attacks on administrators, but because his expressive activities caused "disruption, disharmony, dissension, and create [d) an adverse economic effect on the public service the institution performs."

Id. at 804. The Eighth Circuit also stated that "[c]riticism, no matter how obnoxious or offensive, of government officials and their policies addresses matters of public concern." Id. at 802. Because this case suggests that the nature of an employee's comments do not alter the analysis of whether the employee's speech is on a matter of public concern, the Court will next decide whether the interest of the employee in commenting on the matter outweighs the public employer's interest in promoting its efficiency by prohibiting the conduct.

In making this determination, the Court considers the following factors: (1) the need for harmony in the workplace; (2) whether the job requires a close working relationship between the speaker and co-workers who might be offended by the speech; (3) the time, place and manner of the employee's expression; (4) the context of the dispute; (5) the degree of public interest in-the speech; and (6) whether the speech interfered in the employee's ability to do his job. Shands v. City of Kennett, 993 F.2d 1337, 1344 (8th Cir. 1993). The balance of these factors is flexible, and the weight attributed to any one factor varies depending upon the particular circumstances of each case. Germann v. City of Kansas City, 776 F.2d 761, 764 (8th Cir. 1985). Resolution of the balance is a question of law. Brockell v. Norton, 732 F.2d 664, 667 (8th Cir. 1984). Additionally, in striking the balance, courts must accord to the government the wide degree of discretion necessary for the proper management of internal affairs and personnel actions. Connick, 461 U.S. at 151.

The Court finds that the first three factors weigh heavily in favor of defendants.- First, case law of both the Eighth Circuit and the Supreme Court clearly establishes an enhanced need for harmony within police departments. As the Supreme Court recognized in Kelley v. Johnson, 425 U.S. 238, 246-47 (1976), a police department has a substantial interest in developing "discipline, esprit de corps, and uniformity" within its ranks so as to insure the safety of persons and property. Id. at 246. Thus, the "need for harmony in the work place" is heightened in a public safety service. Shands, 993 F.2d at 1344. Regarding the need for harmony in the work place, evidence of actual disruption in the department is not required. Id. Therefore, the first factor weighs heavily in defendants' favor. Likewise, the Court also finds that Officer McLin's position requires a close working

relationship between himself and the co-workers who might be offended by the speech, especially since McLin's comments could be construed as derogatory toward every white officer in the police department.

As to the time, place, and manner of plaintiff's speech, the Supreme Court has recognized that public dialogue is more likely to disrupt the workplace than a single, private conversation. Rankin v. McPherson, 483 U.S. 378 (1987). Here, plaintiff made his statements in a public place to an audience of thirty-five to forty people. Doc. #46, Exhibit C, page 29. Plaintiff knew that a reporter was present at the workshop. Plaintiff's Statement of Material Facts, Doc. #46, ¶EE. Therefore, plaintiff's comments were not only transmitted to his immediate audience, but also to readers of the St. Louis American newspaper, which included fellow police officers and part of the constituency the police force serves. It is also recognized that the manner of a public employee's speech is an important element in the Pickering balance. See Morales v. Stierheim, 848 F.2d 1145, 1149 (11th Cir. 1988); City of Waycross v. Bryson, 888 F.2d 1562, 1567 (11th Cir. 1989). Here, the manner of plaintiff 's. speech was insulting to other police officers. Dartland-v. Metropolitan Dade County, 866 F.2d 1321, 1324 (11th Cir. 1989)("rude and insulting" nature of speech, when considered in time, place, and manner considerations "gives speech an element of personal as opposed to public interest"). Therefore, the time, place, and manner of plaintiff's speech weighs in favor of defendants.

Neither party has presented the Court with evidence or argument regarding the fourth element of the Pickering test -- the context of the dispute. As to the fifth factor, the Court finds that the public did not have an interest in the two statements for which plaintiff was disciplined. In Waters v. Chaffin, the Eighth Circuit reasoned that "the public has little

interest in an individual's uncouth deprecations of his superior." 684 F.2d 833, 839 (8th Cir. 1982). Using that same analysis, the public also does not have an interest in plaintiff's uncouth deprecations of his supervisors and coworkers.

When considering the sixth factor of the balancing test -- whether the speech impaired the employee's ability to do his job -- the public safety employer's determinations of both the potential for disruption as a result of the speech, as well as the employer's response to the actual or perceived disruption, are entitled to "considerable judicial deference." Shands, 993 F.2d at 1345. A public safety employer "need not allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Tindle v. Caudle, 56 F.3d 966, 972 (8th Cir. 1995) (quoting Connick, 461 U.S. at 152).

As evidence that plaintiff's comments 'would cause a disruption in the workplace, defendants present two letters from police organizations, one from the St. Louis Police Officers Association and the other from the St. Louis Police Fraternal Organization, both condemning plaintiff's comments. Doc. #44, Exhibits A & B. Both organizations requested that their letters be treated as official complaints against Officer McLin and called for an internal investigation of plaintiff. See id. Plaintiff argues that these letters cannot be used to establish the sixth factor because there is no evidence that these letters were considered in deciding whether to discipline plaintiff. However, this assertion is belied by the record. Lieutenant Daniel Simpher, the commander of the Internal Affairs Division, testified before the hearing board that the department received letters from the Fraternal Order of Police and the St. Louis Police Officers Association complaining of plaintiff's comments, and that these letters led, in part, to an investigation of

plaintiff. Doc. #46, Exhibit C, Part-.B; page 20-21. The Court finds that these complaints at least raise the perception that plaintiff's speech was causing disruption in the workplace and that therefore the sixth factor also weighs in favor of defendants.

Thus, five of the six Pickering factors weigh heavily in defendants' favor. Although the Court concludes that plaintiff's speech was not a matter of public concern and hence there is no reason to reach the Pickering balancing phase, the Court finds that even if it does apply the balancing test, defendants prevail as a matter of law on plaintiff's comments relating to his discipline resulting from his comments at the September 1997 workshop.

The Court next considers whether plaintiff's First Amendment rights were violated when a misconduct report was placed in his file after he allegedly presented the mayor and chief of police of Detroit with a box of Uncle Ben's white rice and a box of Oreos. The Court notes that plaintiff's complaint does not allege that the individual members of the Board of Police Commissioners were involved in the decision to place a misconduct report in plaintiff's file.[4] Therefore, the Court is only considering whether a claim remains against defendant Henderson, whom plaintiff alleges endorsed and ratified the decision to place the misconduct report in plaintiff's file.

Defendant's argument in support of summary judgment on this claim is that plaintiff failed to contest or otherwise appeal the placement of the misconduct report in

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[4] The partial judgment entered herewith will fully dispose of all plaintiff's claims against the Board of Police Commissioners and its individual members.

his file, and therefore, the Court does not have jurisdiction to hear the claim because plaintiff failed to exhaust his administrative remedies. However, exhaustion of administrative remedies is not required in a §1983 action. Patsy v. Board of Regents, 457 U.S. 496, 500 (1982). Because defendant has presented no further argument or evidence in support of his motion on this point, the Court finds that it cannot grant summary judgment in favor of defendant Henderson on plaintiff's claim that his First Amendment rights were violated when a misconduct report was placed in his file in August of 1996. This claim against defendant Henderson remains for trial. Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment [Doc. #44] is granted in part and denied in part.

Dated this 21st day of April, 2000.

Donald J. Stohr
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DENNIS MCLIN,	)	
	)	
Plaintiff,	)	No. 4:99CV514-DJS
	)	
vs.	)	
	)	FILED
BOARD OF POLICE	)	APR 21 2000
COMMISSIONERS OF THE	)	U.S. Dist. Court
METROPOLITAN POLICE	)	Eastern District
DEPARTMENT OF THE CITY OF Louis	)	of MO, St.
ST. LOUIS, et al.,	)	
	)	
Defendants.		

PARTIAL JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED and DECREED that summary judgment is granted against plaintiff and in favor of defendants Board of Police Commissioners of the Metropolitan Police Department of the City of St. Louis, Wayman F. Smith, III, Jeff S. Jamieson, Edward M. Roth, Leslie F. Bond, Sr., Clarence Harmon, Paul Nocchiero, Charles Mischeaux, Annie Marie Clark, Ronald

Padberg, and Matthew Harr.[1]

IT IS FURTHER ORDERED, ADJUDGED and DECREED that summary judgment is granted in favor of defendant Ronald Henderson as to the portion of plaintiff's claim relating to events occurring at the September 1997 workshop.

Dated this 21st day of April, 2000

Donald J. Stohr
United States District Judge

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[1] The The Court believes that three of the Board members' names are spelled incorrectly in the complaint. The defendant listed as Annie Marie Clark should be Anne-Marie Clarke. The defendant referred to as Ronald Padberg should be Matthew Padberg, and the defendant listed as Matthew Harr should be Robert Haar.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DENNIS MCLIN,	)	
	)	
Plaintiff,	)	No. 4:99CV514-DJS
	)	
vs.	)	
	)	FILED
BOARD OF POLICE	)	APR 21 2000
COMMISSIONERS OF THE	)	U.S. Dist. Court
METROPOLITAN POLICE	)	Eastern District
DEPARTMENT OF THE CITY OF Louis	)	of MO, St.
ST. LOUIS, et al.,	)	
	)	
Defendants.		

ORDER

This matter comes before the Court on a "Stipulation of Dismissal" filed by the parties which stipulates "to the dismissal of the cause of action against Ronald Henderson in the above-captioned matter without prejudice." On April 21, 2000, this Court granted partial summary judgment in favor of all defendants as to plaintiff's claim regarding the September 1997 workshop and for all defendants except Ronald Henderson as to plaintiff's claim arising from the 1996 conference in Detroit. Facially, the stipulation appears to try to dismiss all claims against defendant Henderson, even the claim already resolved by the Court's summary

judgment order. However, based on communications with both counsel, the Court understands the parties only intend to dismiss the sole remaining claim against defendant Henderson relating to the 1996 conference in Detroit.

Accordingly,

IT IS HEREBY ORDERED that the parties' stipulation of dismissal is construed as a dismissal of the sole remaining claim against defendant Ronald Henderson, and thus construed, the stipulation is so ordered by the Court.

Dated this 10th day of May, 2000.

Donald J. Stohr
United States District Judge

The St. Louis American, October 2-8, 1997

POLICEMAN TAKES STAND AGAINST ABUSE

By Ishmael Lateef Ahmad
St. Louis American Senior Writer

St. Louis – Verbal and physical abuse by police are sicknesses that can be cured, said a St. Louis police officer known for his efforts to improve treatment of black officers and civilians.

Dennis McLin recently addressed a workshop on police brutality – how to avoid it and what to do about it.

"This is a sickness. They (abusive officers) need doctors," McLin said, offering suggestions on what to do when being detained by police. He suggested that persons should remain calm and logical, even if the officer is acting improperly. While motorists have a legal right to ask why they are being stopped, first, and upon request, show your driver's license, insurance and registration, he said.

"Why argue with him? He has a badge number. He has a number on his vehicle. Do not argue. That makes him think he has a right to pull you out of your vehicle," McLin said. "Do not be too quick to give police permission to search your homes and vehicles. Demand a search warrant. Do not consent."

He said that if police insist on searching your home, you should ask for a police badge; ask their purpose in coming into your house; remember badge numbers, what they look like and the time of day. When police take your property they must give you a written receipt, except for property they

intend to use as evidence. If they arrest someone, or if it's an emergency, they can search without a warrant.

On the street, always get names, badge numbers and police vehicle numbers. And whenever possible stop your vehicle in a well lit area and wait until police ask for what they want, he said. "If at night, turn your dome light on and place your hands on the steering wheel. It is best to do nothing that would give police reason to search. Protest traffic tickets in traffic court, not on the street," he said.

Young black males are frequent targets of police stops and questioning, and many police departments have secret codes to identify black motorists who enter their turf, McLin said.

In St. Louis, many "Billy Bob, tobacco chewing white police officers" are recruited from "Boondocks, Missouri" and lack diversity and racial sensitivity, McLin said.

"Often abusive officers were "sissies in high and grade school. But when they put on that uniform they are the man they never were before."

McLin contends that police brutality is not tolerated in the white community. "If it is (there) it will be dealt with," he said. "We have to start holding our police accountable. I'm sorry. Where are our black politicians when this type of behavior occurs?" McLin is the Midwest region president of the 30,000 strong National Black Police Association.

In the past, McLin has been outspoken about how officers of color are treated. Most notably, he challenged the tests used to hire and promote officers. The former canine officer said he thinks that, and his outspokenness to higher ranking

officers, led to his being transferred ("buried," one associate said) in the prisoner processing unit.

"I respect their rank and I am not insubordinate," McLin said. "I do not respect anyone who disrespects me."

McLin said he knows he is a target among white officers. "All throughout the St. Louis Police Department, in any bathroom you go in, my name is on the wall. 'We are going to kill him. We are going to get him,'" McLin said, quoting the graffiti.

"He puts himself at great risk," said Bill Monroe, a decorated former St. Louis police detective who left in 1976 after only 10 years. "He has sacrificed his career, possibly his life . . . because you are dealing with a violent workforce (cops). Let's not let him, ourselves down."

Racism and abuse among police is rampant, McLin said. "I do not forget where I'm coming from. Everyday I put on that uniform I am a black man and they do not let me forget that. To (some white) we are just Negroes with badges on."

McLin urged the public to speak out against police brutality and file complaints. Document the circumstances of police brutality; support each other in challenging such incidents; and provide investigators with solid statements and accurate information, McLin said.

When filing a complaint ask for a case number and do follow-up. "Do not just make a complaint and go home and think it will be investigated (fully)."

Supreme Court, U.S.
FILED

No. 01-755

IN THE

Supreme Court of the United States

DENNIS MCLIN,
Petitioner,

v.

BOARD OF POLICE COMMISSIONERS OF THE METROPOLITAN ST. LOUIS POLICE DEPARTMENT, WAYMAN F. SMITH, III, JEFF S. JAMIESON, EDWARD M. ROTH, LESLIE F. BOND, CLARENCE HARMON, PAUL NOCCHIERO, CHARLES MISCHEAUX, ANNE-MARIE CLARKE, MATHEW PADBERG, ROBERT HAAR, AND RONALD HENDERSON.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PATRICIA A. HAGEMAN
City Counselor

EDWARD J. HANLON
*Deputy City Counselor**

MICHAEL F. STELZER
Associate City Counselor

314 CITY HALL
ST. LOUIS, MO 63103
(314) 622-3361
(314) 622-4956 (FAX)

ATTORNEYS FOR RESPONDENTS

* Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS BOARD OF POLICE COMMISSIONERS OF THE METROPOLITAN ST. LOUIS POLICE DEPARTMENT, WAYMAN F. SMITH, III, JEFF S. JAMIESON, EDWARD M. ROTH, LESLIE F. BOND, CLARENCE HARMON, PAUL NOCCHIERO, CHARLES MISCHEAUX, ANNE-MARIE CLARK, MATTHEW PADBERG, ROBERT HARR, AND RONALD HENDERSON

Respondents Board of Police Commissioners of the Metropolitan St. Louis Police Department, Wayman F. Smith, III, Jeff S. Jamieson, Edward M. Roth, Leslie F. Bond, Clarence Harmon, Paul Nocchiero, Charles Mischeaux, Anne-Marie Clark, Matthew Padberg, Robert Harr and Ronald Henderson respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. The decision of the Eighth Circuit below is not published.

STATEMENT OF THE CASE

Plaintiff Dennis McLin filed the underlying action on March 30, 1999, in the United States District Court Eastern District of Missouri against the respondents. Plaintiff, a member of the Metropolitan St. Louis Police Department (MSLPD), filed the underlying action claiming that his First Amendment freedom of speech rights were violated and that defendants were therefore liable under 42 U.S.C. 1983. Plaintiff's complaint alleged that he was disciplined during his employment for exercising his First Amendment right to freedom of speech.

The district court on or about April 21, 2000, entered its Order granting defendants' motion for summary judgment. In its Order, the district court stated that the speech for which plaintiff was disciplined was not protected speech in that it was not a matter of public concern. Alternatively, the district court stated that even if the speech was otherwise on a matter of public concern, the Police Department could nevertheless punish such speech under the analysis of *Pickering v. Board of Education*, 391 U.S. 563 (1968). (Petition For Writ Of Certiorari, p. A-19).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's grant of summary judgment for the defendants. In its per curiam opinion, the Eighth Circuit assumed, for purposes of its decision, that the speech in which plaintiff engaged was upon a matter of public concern. (Petition, p. A-5). The Eight Circuit agreed with the district court that under *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983), the Police Department could nevertheless impose disciplinary action upon plaintiff. (Id.)

Statement of the Facts

In September of 1997, plaintiff attended a workshop on police brutality and racism sponsored by the National Black Police Association (NBPA) of which plaintiff is the Midwest Regional President. The workshop was held at the Afro Centric Bookstore and was free and open to the public. Plaintiff gave a speech while at the workshop and various portions of that speech were reported by the St. Louis American Newspaper. Included in that report by the St. Louis American were the following passages:

> In St. Louis many "Billy Bob, tobacco chewing white police officers" are recruited from "boondocks Missouri" and lack diversity and racial sensitivity, McLin said.
>
> "Often abusive officers were sissies in high and grade school but when they put on that uniform they are the man they never were before."

Based on the above two comments and not the general topic of the speech (police brutality and racism) the MSLPD charged plaintiff with a violation of Rule 7,

Section 7.004(JJ) of the Police Manual. That Section provides that Police Officers are subject to disciplinary action for engaging in conduct or acts on or off duty which may bring discredit upon the Department or its personnel. Plaintiff was suspended for 15 days without pay for the above violation.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Eighth Circuit's Opinion Is Wholly Consistent With *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968)

At page 7 of his Petition for a Writ of Certiorari, Petitioner Dennis McLin states that "the District Court expressed doubt as to the public significance of McLin's speech about racism and police brutality in the Metropolitan St. Louis Police Department (MSLPD), holding that it was not a matter of public concern, . . ." The district court specifically pointed out that the Petitioner was correct in asserting that his general discussion of alleged racial problems was protected speech on a matter of public concern. (See Petition, p. A-14). The district court then went on to properly point out that the Court's inquiry was not whether all of the Petitioner's statements were of public concern but only the comments for which he was disciplined. (Id., pp. A-14 - A-15). The district court held that the comments for which Petitioner was disciplined were nothing more than personal attacks on fellow officers and therefore not protected speech. (Id., p. A-15). More importantly, the district court clearly noted the importance of Petitioner's failure to dispute that he was punished only for two specific comments and not the more general comments he made

concerning alleged racism within the Police Department.[1] (Id. A-14).

Petitioner's specific comments concerning the "Billy Bob tobacco chewing white police officers" and that his "fellow officers are sissies" is the type of caustic personal attack which is no longer deemed relevant to a matter of public concern. See *Connick v. Myers*, 461 U.S. 138, 146-149 (1983). Petitioner failed to cite a single case in response to the Summary Judgment Motion; in his brief in the Eighth Circuit; in his Motion for Rehearing, en banc in the Eighth Circuit; or in his Petition for Writ of Certiorari where any Court has upheld the right of a governmental employee (especially a governmental employee within a police or fire department) to use racially derogatory remarks and then hide behind his or her First Amendment Right to freedom of speech. Should Petitioner be allowed to use this type of language against fellow officers with no fear of discipline, the ability of the Board of Police Commissioners and other governmental units to create the atmosphere where employees are able to efficiently perform their jobs will be greatly impaired.[2] The Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968) clearly understood the importance that the State has in promoting such efficiency in

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[1] The two comments that were the basis for Petitioner's discipline are set forth in the district court's opinion at p. A-10 of the Petition.

[2] Respondents would also note that under *Monell v. New York Dept. of Social Services* 436 U.S. 658 (1978) and 42 U.S.C. 1983 they may be held liable for a failure to discipline officers. It is no great stretch to imagine a scenario where the Board of Police Commissioners could be held liable for Officer McLin's behavior based upon a theory of failing to discipline him for making racially derogatory remarks.

its public services. Nothing in the summary judgment order or the opinion of the Eighth Circuit conflicts with the plain language or the intent of *Pickering*.

Petitioner's argument that speech on police racism and brutality is a matter of public concern is not in dispute here. As pointed out previously, what is in dispute is whether or not his personal, caustic attacks on his co-workers are a matter of public concern. Clearly they are not. Petitioner argues that the district court took insufficient note of the history of racial profiling of African Americans. That is only relevant if the speech for which he was disciplined was a matter of public concern. *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education* 391 U.S. 563 (1968). Petitioner has never been able to cite a case wherein a public employee was allowed to defend racially derogatory comments about fellow employees by arguing they are a matter of public concern.

Petitioner further argues that the public employer may not punish an employee for speaking on a matter of public concern unless it can make a substantial showing of actual or potential disruption. Petitioner misrepresents the evidence produced against Officer McLin which included letters of complaints submitted by representatives of two police officer associations which comprise a large percentage of the officers employed by the St. Louis Metropolitan Police Department.[3] The

[3] Page 14 of the Petitioner's Petition for Writ of Certiorari refers to a "heckler's veto" that would obliterate the *Pickering* balancing test. The Petition ignores the fact that Lieutenant Simpher testified at Officer McLin's board hearing that two letters were received from police organizations representing a significant number of fellow officers within the Department expressing concern over the comments published.

Pickering balancing test need not be applied as the public has little interest in a public employee's uncouth deprecations of his supervisor. The same analogy would apply to the Petitioner's uncouth deprecations of his co-workers.

Lastly, the public employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick v. Myers*, 461 U.S. at 152. "[W]e have consistently given greater deference to governmental predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on speech by the public at large." *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

The issues concerning "public concern" and "balancing" are issues of law. No misapplication of the law was made by the Eighth Circuit. Personal caustic attacks are not protected speech, therefore, the *Pickering* balancing test is irrelevant. Despite that, the district court, in an abundance of caution reviewed this test and concluded that it weighed in favor of the Board of Police Commissioners' decision to discipline Officer McLin for his racially derogatory remarks.

WHEREFORE, Respondents pray that the Court deny Petitioner's Petition for a Writ of Certiorari and that no further action be taken by the Court regarding this matter.

RESPECTFULLY SUBMITTED,

PATRICIA A. HAGEMAN,
CITY COUNSELOR

Edward J. Hanlon*
Deputy City Counselor
Michael F. Stelzer
Associate City Counselor
Attorneys for Respondents
314 City Hall
St. Louis, MO 63103
(314)622-3361
(314)622-4956 (fax)
* Counsel of Record